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CDx Diagnostics, Inc. and

Shared Medical Resources. LLC

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CDX DIAGNOSTICS, INC., and
SHARED MEDICAL RESOURCES, LLC,

Plaintiffs,

v.

HISTOLOGICS, LLC, POPLAR
HEALTHCARE PLLC, MATTISON
PATHOLOGY LLP, AND JOHN DOES 1-
30,

Defendants.

AND RELATED COUNTERCLAIM

Case No. CV13-07909 DOC (RNBx)

**CDX DIAGNOSTICS, INC. AND
SHARED MEDICAL RESOURCES
LLC'S ANSWER AND
AFFIRMATIVE DEFENSES TO
DEFENDANT HISTOLOGICS,
LLC'S AMENDED
COUNTERCLAIMS**

1 Plaintiffs CDX Diagnostics Inc. (“CDX”) and Shared Medical Resources LLC
2 (“SMR”) hereby answer the numbered paragraphs of Defendant Histologics, LLC
3 (“Histologics”)’s Amended Counterclaims.

4 **PARTIES**

5 59. SMR and CDX are without information or knowledge sufficient to form a
6 belief as to the truth or falsity of the allegations set forth in Paragraph 59 of the
7 Counterclaims, and therefore, deny the same.

8 60. SMR and CDX admit the allegations in Paragraph 60 of the Counterclaims.

9 61. SMR and CDX admit the allegations in Paragraph 61 of the Counterclaims.

10 **JURISDICTION AND VENUE**

11 62. SMR and CDX admit the allegations contained in Paragraph 62 of the
12 Counterclaims

13 63. SMR and CDX admit only that this Court has personal jurisdiction over SMR.
14 SMR and CDX admit that SMR’s principal place of business is in the State of California.
15 SMR and CDX admit that SMR has done business with respect to its goods covered by the
16 ‘044 patent within California and in this judicial district. As for the remaining allegations
17 in Paragraph 63 of the Counterclaims with respect to the allegations relating to the
18 complained-of acts, they state legal conclusions to which no response is required. To the
19 extent that a response is required, Defendants deny all of the remaining allegations
20 contained therein.

21 64. SMR and CDX admit only that this Court has personal jurisdiction over CDX,
22 and that it alleged that it is the co-owner of the ‘044 Patent with SMR. SMR and CDX are
23 without information or knowledge sufficient to form a belief as to the truth of the
24 remaining allegations in Paragraph 64 of the Counterclaims in part due to vagueness and to
25 legal conclusions being stated, to which no response is required, and therefore, deny all the
26 remaining allegations contained therein.

27 65. CDX and SMR admit the allegations in Paragraph 65 of the Counterclaims.
28

FACTUAL BACKGROUND

66. CDX and SMR deny the allegations contained in Paragraph 66 of the Counterclaims.

67. CDX and SMR are without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 67 of the Counterclaims, and therefore, deny the same.

68. CDX and SMR are without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 68 of the Counterclaims, and therefore, deny the same.

69. CDX and SMR are without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 69 of the Counterclaims, and therefore, deny the same.

70. CDX and SMR are without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 70 of the Counterclaims, and therefore, deny the same.

71. CDX and SMR are without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 71 of the Counterclaims, and therefore, deny the same.

72. CDX admits only that Rutenberg had seen a version of a SpiraBrush made by Trylon Corporation, that he approached Trylon, that Oralscan's business was based on computerized analysis of tissue samples, and is without information or knowledge sufficient to form a belief as to the truth or falsity of the remaining allegations set forth in Paragraph 72 of the Counterclaims in part due to vagueness, and therefore denies the same. SMR is without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 19 of the Counterclaims, and therefore denies the same.

73. CDX admits only that Trylon and OralScan entered into a joint venture for the commercialization of a version of a SpiraBrush made by Trylon and denies the remaining

1 allegations set forth in Paragraph 73 of the Counterclaims in part due to the vagueness of
2 the term SpiraBrush. SMR is without information or knowledge sufficient to form a belief
3 as to the truth or falsity of the allegations set forth in Paragraph 73 of the Counterclaims,
4 and therefore denies the same.

5 74. CDX admits only that the Levisohn law firm (Morris Cohen) and Mark
6 Rutenberg filed a provisional application as Application No. 60/093,910, listing Dr. Neal
7 Lonky and Jeremy James Michael Papadopoulos as inventors, on or about July 23, 1998
8 which ultimately issued as the '044 Patent and denies the remaining allegation in Paragraph
9 74 of the Counterclaims. SMR is without information or knowledge sufficient to form a
10 belief as to the truth or falsity of the allegations set forth in Paragraph 74 of the
11 Counterclaims, and therefore denies the same.

12 75. CDX admits only that Mark Rutenberg represented that OralScan would pay
13 for all patent costs and prosecute a patent relating to a version of a SpiraBrush and is
14 without information or knowledge sufficient to form a belief as to the remaining allegations
15 set forth in Paragraph 75 of the Counterclaims and therefore denies those allegations. SMR
16 is without information or knowledge sufficient to form a belief as to the truth or falsity of
17 the allegations set forth in Paragraph 75 of the Counterclaims, and therefore denies the
18 same.

19 76. CDX admits only that it entered into an assignment and licensing agreement,
20 that the agreement speaks for itself, is without information or knowledge sufficient to form
21 a belief as to the truth or falsity of the remaining allegations and therefore denies those
22 allegations. SMR is without information or knowledge sufficient to form a belief as to the
23 truth or falsity of the allegations set forth in Paragraph 76 of the Counterclaims in part due
24 to vagueness, and therefore denies the same.

25 77. CDX denies the allegation regarding Mark Rutenberg and the Levisohn firm
26 filing a shadow application. CDX admits that the referenced documents speak for
27 themselves. CDX denies the remaining allegations set forth in Paragraph 77 of the
28 Counterclaims, and therefore denies the same. SMR is without information or knowledge

1 sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph
2 77 of the Counterclaims, and therefore denies the same.

3 78. CDX and SMR admit only that the documents speak for themselves and that
4 the Eisen '044 specification contains the language quote in Paragraph 78 of the
5 Counterclaims and deny the remaining allegations set forth in Paragraph 78 of the
6 Counterclaims.

7 79. CDX is without information or knowledge sufficient to form a belief as to the
8 truth or falsity of the allegations set forth in Paragraph 79 of the Counterclaims in part due
9 to vagueness, and therefore denies the same. SMR admits only the allegations that SMR
10 purchased Trylon's assets in a foreclosure proceeding and is without information or
11 knowledge sufficient to form a belief as to the truth or falsity of the remaining allegations
12 set forth in Paragraph 79 of the Counterclaims in part due to vagueness, and therefore
13 denies the same.

14 80. CDX admits only that SMR sold an equal and undivided interest in the '044
15 patent to OralScan and is without information or knowledge sufficient to form a belief as to
16 the truth or falsity of the remaining allegations in Paragraph 80 of the Counterclaims in part
17 due to vagueness and therefore denies those allegations in Paragraph 80. SMR admits only
18 that SMR sold an equal and undivided interest in the '044 patent to OralScan and denies
19 the remaining allegations in Paragraph 80 of the Counterclaims.

20 81. CDX admits the allegations in Paragraph 81 of the Counterclaims. SMR is
21 without information or knowledge sufficient to form a belief as to the truth or falsity of the
22 allegations in Paragraph 81 of the Counterclaims and therefore denies the same.

23 82. CDX admits the allegations in Paragraph 82 of the Counterclaims. SMR is
24 without information or knowledge sufficient to form a belief as to the truth or falsity of the
25 allegations in Paragraph 82 of the Counterclaims and therefore denies the same.

26 83. CDX admits the allegations in Paragraph 83 of the Counterclaims. SMR is
27 without information or knowledge sufficient to form a belief as to the truth or falsity of the
28 allegations in Paragraph 83 of the Counterclaims and therefore denies the same.

1 84. CDX admits the allegations in Paragraph 84 of the Counterclaims. SMR is
2 without information or knowledge sufficient to form a belief as to the truth or falsity of the
3 allegations in Paragraph 84 of the Counterclaims and therefore denies the same.

4 85. CDX admits the allegations in Paragraph 85 of the Counterclaims. SMR is
5 without information or knowledge sufficient to form a belief as to the truth or falsity of the
6 allegations in Paragraph 83 of the Counterclaims and therefore denies the same.

7 86. CDX admits only the allegations regarding the bankruptcy matter being
8 dismissed by settlement on December 19, 2012, and that the court proceedings ended on or
9 about January 14, 2013 as set forth in Paragraph 86 of the Counterclaims, and is without
10 information or knowledge sufficient to form a belief as to the truth or falsity of the
11 remaining allegations in Paragraph 86 of the Counterclaims in part due to vagueness, and
12 therefore denies the same. SMR is without information or knowledge sufficient to form a
13 belief as to the truth or falsity of the allegations in Paragraph 86 of the Counterclaims and
14 therefore denies the same.

15 87. CDX and SMR are without information or knowledge sufficient to form a
16 belief as to the truth or falsity of the allegations in Paragraph 87 of the Counterclaims in
17 part due to vagueness, and therefore deny the same.

18 88. CDX and SMR are without information or knowledge sufficient to form a
19 belief as to the truth or falsity of the allegations in Paragraph 88 of the Counterclaims in
20 part due to vagueness, and therefore deny the same.

21 89. CDX and SMR admit the allegations set forth in Paragraph 89 of the
22 Counterclaims.

23 90. CDX and SMR admit only that Histologics filed for declaratory relief and are
24 without information or knowledge sufficient to form a belief as to the truth or falsity of the
25 remaining allegations in Paragraph 90 of the Counterclaims in part due to vagueness, and
26 therefore deny the same.

COUNT 1

(Declaratory Judgment of Non-Infringement of U.S. Patent No. 6,258,044)

91. CDX and SMR hereby incorporate all the answers of the paragraphs above as if fully set forth herein.

92. CDX and SMR admit only that a controversy exists between Histologics and CDX and SMR because of the lawsuit brought by CDX and SMR and are without information or knowledge sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 92 of the Counterclaims in part due to vagueness and legal conclusions being stated, and therefore deny the same.

93. CDX and SMR deny the allegations set forth in Paragraph 93 of the Counterclaims.

COUNT 2

(Declaratory Judgment of Invalidity of U.S. Patent No. 6,258,044)

94. CDX and SMR hereby incorporate all the answers of the paragraphs above as if fully set forth herein.

95. CDX and SMR admit only that a controversy exists between Histologics and CDX and SMR because of the lawsuit brought by CDX and SMR, and are without information or knowledge sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 92 of the Counterclaims in part due to vagueness and legal conclusions being stated, and therefore deny the same.

96. CDX and SMR deny the allegations set forth in Paragraph 96 of the Counterclaims.

97. CDX and SMR deny the allegations set forth in Paragraph 97 of the Counterclaims.

COUNT 3

(Declaratory Judgment of Unenforceability of U.S. Patent No. 6,258,044)

98. CDX and SMR hereby incorporate all the answers of the paragraphs above as if fully set forth herein.

1 99. CDX and SMR admit only that a controversy exists between Histologics and
2 CDX and SMR because of the lawsuit brought by CDX and SMR, and are without
3 information or knowledge sufficient to form a belief as to the truth or falsity of the
4 remaining allegations in Paragraph 99 of the Counterclaims in part due to vagueness and
5 legal conclusions being stated, and therefore deny the same.

6 100. CDX and SMR deny the allegations set forth in Paragraph 100 of the
7 Counterclaims.

8 101. CDX and SMR deny the allegations set forth in Paragraph 101 of the
9 Counterclaims.

10 102. CDX and SMR deny the allegations set forth in Paragraph 102 of the
11 Counterclaims.

12 103. CDX and SMR deny the allegations set forth in Paragraph 103 of the
13 Counterclaims.

14 104. CDX and SMR deny the allegations set forth in Paragraph 104 of the
15 Counterclaims.

16 105. CDX and SMR are without information or knowledge sufficient to form a
17 belief as to the truth or falsity of the allegations in Paragraph 105 of the Counterclaims in
18 part due to vagueness and legal conclusions being stated, and therefore deny the same.

19 106. CDX and SMR deny the allegations set forth in Paragraph 106 of the
20 Counterclaims.

21 107. CDX and SMR deny the allegations set forth in Paragraph 107 of the
22 Counterclaims.

23 108. CDX and SMR deny the allegations set forth in Paragraph 106 of the
24 Counterclaims.

25 **FURTHER ANSWER AND AFFIRMATIVE DEFENSES**

26 CDX and SMR further deny each and every allegation in Histologics' Amended
27 Answer and Counterclaims that was not specifically admitted, denied, or otherwise
28 responded to herein. CDX and SMR specifically deny that Histologics is entitled to any

1 relief whatsoever from SMR, CDX or the Court as requested in Histologics' Prayer for
2 Relief or otherwise.

3
4 **AFFIRMATIVE DEFENSES**

5 Without admitting or acknowledging what must be alleged by way of affirmative
6 defenses or that CDX and SMR bear the burden of proof as to any of the defenses set forth
7 herein; CDX and SMR allege the following as additional or affirmative defenses to the
8 Amended Counterclaims, to the purported claims therein, and to the relief sought therein.

9 **FIRST AFFIRMATIVE DEFENSE**

10 The Amended Counterclaims fails to state a claim against CDX and SMR upon
11 which relief can be granted.

12 **SECOND AFFIRMATIVE DEFENSE**

13 The Amended Counterclaims fail because each claim of the Asserted Patent is valid,
14 enforceable, and in full compliance with the patentability requirements of, *inter alia*, 35
15 U.S.C. §§ 101, 102, 103, and 112 and at least one of the claims of the Asserted Patent is
16 infringed by Histologics.

17 **THIRD AFFIRMATIVE DEFENSE**

18 The Amended Counterclaims are barred by the doctrines of waiver, estoppels
19 (including but not limited to assignor estoppel), laches, unclean hands, and/or
20 acquiescence.

21 **FOURTH AFFIRMATIVE DEFENSE**

22 The Amended Counterclaims are barred by the doctrine of assignor estoppel.

23 **FURTHER ADDITIONAL DEFENSES**

24 In addition to the defenses set forth above, CDX and SMR reserve the right to raise,
25 assert, rely upon, or add any and new or additional defenses under Rule 8(c) of the Federal
26 Rules of Civil Procedure ["Rules(s)"], the laws of the United States, the laws of any other
27 governing jurisdictions that may exist or in the future be applicable based on discovery and
28

1 further factual investigation in this Action, and reserves the right to amend any and all
2 defenses set forth above as discovery proceeds.

3
4 **DEMAND FOR JURY TRIAL**

5 Pursuant to Rule 38, CDX and SMR demand TRIAL BY JURY of all issues so
6 triable, whether presented by CDX's and SMR's claims against Histologics, Histologics'
7 amended counterclaims against CDX and SMR, or otherwise. CDX and SMR demand
8 TRIAL BY JURY of all causes so triable.

9
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11 Dated: July 16, 2014

ONE LLP

12
13 By: /s/ Nathaniel Dilger
14 Nathaniel L. Dilger, Esq.

15 **LEVISOHN BERGER LLP**

16
17 By: /s/ Peter Berger
18 Peter L. Berger (*Pro Hac Vice*)

19 *Attorneys for Plaintiffs and Counter-Defendants,*
20 *CDx Diagnostics, Inc. and*
21 *Shared Medical Resources, LLC*